

95361

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

50528

FILE: B-182679

DATE: February 12, 1975

MATTER OF: Advance Conversion Devices Company

DIGEST:

Agency action of opening proposals without amending allegedly ambiguous specification in light of protester's earlier letter of complaint is adverse agency action and protest filed with GAO more than 5 days after that action is untimely under section 20.2(a) of bid protest procedures.

On November 15, 1974, Advance Conversion Devices Company (Devices) filed a protest against the award of any contract under request for proposals (RFP) M00150-75-R-0104 by the Marine Corps Supply Activity, Philadelphia, Pennsylvania, for 84 solid-state frequency converters.

Under date of January 2, 1975, the procurement agency submitted a documented report on the protest and, upon review thereof, we have concluded that the protest may not be considered under our bid protest procedures. The RFP was issued on September 3, 1974, with a scheduled closing date for receipt of proposals of October 3, 1974. By letter of September 23, 1974, Devices advised the contracting officer that the specifications were not sufficiently definite and complete to assure that the item would perform as intended. Devices noted certain areas it felt deficient, pointed out alleged omissions and concluded that it would prepare its proposal in accordance with the specifications. In addition, Devices indicated that it would submit an alternate proposal on the basis outlined in the letter, which would be substantially the same as a model solicited by the United States Coast Guard in another procurement.

In view of this letter, the activity reviewed its technical requirements and concluded that it adequately reflected the Government's minimum need without clarification. To facilitate its review, the closing date for receipt of proposals was extended to November 4, 1974, by amendment 0001. This change was orally communicated to Devices by telephone conversation of September 26, 1974. In an October 9, 1974, telephone conversation with Devices, the contracting officer stated that the technical review concluded that the specification did not need

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to be revised. Further, it was noted that the equipment Devices had produced for the Coast Guard was more complicated and sophisticated than was necessary for the activity's purposes. At the conclusion of the conversation, Devices expressed its desire to meet with technical personnel to discuss the specifications.

While Devices did not submit a proposal, by letter dated November 4, 1974, Devices explained its reasons for its "NO-BID." Also, Devices again pursued its request to meet with technical personnel to explain the deficiencies with the specification and demonstrate its product. Devices also stated that it was not protesting at that time. Of the six proposals that were opened on November 5, 1974, none excepted to the technical requirements of the specification. On November 11, 1974, the contracting officer again denied Devices request for a meeting at that time and on November 14, 1974, Devices sent its telegraphic protest to our Office.

Section 20.2(a) of our bid protest procedures requires that:

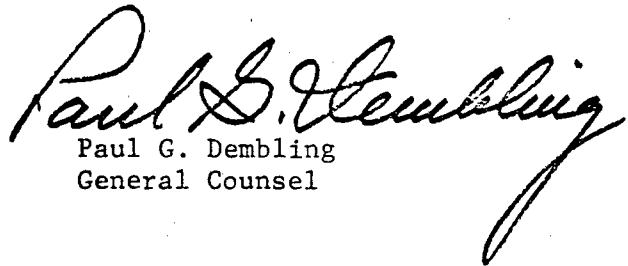
"* * * Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of proposals shall be filed prior to bid opening or the closing date for receipt of proposals. In other cases, bid protests shall be filed not later than 5 days after the basis for protest is known or should have been known, whichever is earlier. If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 5 days of notification of adverse agency action will be considered provided the initial protest to the agency was made timely."

The alleged deficiencies in the RFP were clearly apparent to Devices prior to the closing date for receipt of proposals, as evidenced by its letter of September 23, 1974. Even viewing Devices' actions in a light most favorable to it by considering the September 23 letter as a protest, when the procurement activity advised

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Devices on October 9, 1974, that it had reviewed its specification and determined that no changes were necessary and the RFP would not be amended as requested, Devices was required to protest to our Office within 5 days of that notification of adverse agency action. In any event, the opening of proposals on November 5, 1974, without modifying the RFP is deemed adverse agency action within the meaning of section 20.2(a) above.

Therefore, since Devices' protest was not filed until November 15, 1974 (10 days after the closing date for receipt of proposals, or 24 days after notification that the RFP would not be amended as requested), it is untimely and will not be considered on its merits.


Paul G. Dembling
General Counsel